



## **IN THE HIGH COURT OF ESWATINI**

### **JUDGMENT**

**HELD AT MBABANE**

**Case No.: 769/2022**

In the matter between:

**PHE SHEYA LOKOTFWAKO**

**Plaintiff**

And

**LUCKY'S ARK INVESTMENTS (PTY) LTD**

**1<sup>st</sup> Defendant**

**LUCKY NGUBANE**

**2<sup>nd</sup> Defendant**

**Neutral Citation:** *Phesheya Lokotfwako vs Lucky's Ark (Pty) Ltd and Another*  
(769/2022) [2023] SZHC 52 (16/03/2023)

**Coram:** **K. MANZINI J**

**Date Heard:** 15 July, 2022.

**Date Delivered:** 16 March, 2023.

**SUMMARY:** *Civil procedure – Application for summary Judgment founded on an oral sale agreement in respect of a truck – Defendants resist application and allege that they have a counter claim (set-off), and deny the number of oral*

*agreements, the amount of money allegedly, owed, as well as essentially all of the terms of the single oral agreement that Plaintiff does seek to rely upon.*

*Held: Application for Summary Judgment denied. Claim herein is referred to trial.*

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## **JUDGMENT**

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**K. MANZINI – J:**

[1] The issue for determination herein is centred on the issue of whether or not it is appropriate to grant Summary Judgment in the Plaintiff's favour in the present circumstances.

[2] The question of whether or not to grant summary Judgment arises in the following circumstances:-

On or about December, 2022, and at the Defendant's business premises, known as "Etingadzeni", in the Piggs' Peak area, Hhohho Region, the Plaintiff and Defendant concluded an oral agreement for the sale of a motor vehicle which is described as follows:

**Make: Mercedes Benz**

**Model: Actros Truck (horse and trailer) 2014**

**Registration Number: FM 6958 GP**

**Vin Number: WD B93416161914394**

[3] According to the Plaintiff's declaration filed after the simple summons herein, the Plaintiff represented himself, whilst the 1<sup>st</sup> Defendant was represented by the 2<sup>nd</sup> Defendant during the conclusion of the said verbal agreement. The material terms of the said verbal agreement, according to the Declaration are as follows:

3.1 (a) Plaintiff agreed to purchase the said vehicle from the 1<sup>st</sup>

Respondent for the agreed purchase price of E850,000.00 (Eight Hundred and Fifty Thousand Emalangeni) which was to be payable in the following manner:

(i) A deposit of E500,000.00 (Five Hundred Thousand Emalangeni) was to be made by the Plaintiff;

- (ii) The balance was to be paid by the Plaintiff in the form of providing courier services to the Defendant, to enable the Defendants to efficiently service and maintain a courier contract they had with a certain “*Saphaku Cement*”, for the transportation of inter alia cement, from Lichtenburg (North West South Africa) to Jozini (South Africa), and for which service the parties herein agreed would be at the rate of E17,000.00 (Seventeen Thousand Emalangeni) per trip.
  
- (b) Delivery of the Merx (truck-horse and trailer) was to be effected by the Defendants upon presentation of proof of payment by the Plaintiff.
  
- (c) The 2<sup>nd</sup> Defendant further bound himself as surety and/or co. and principal debtor for the due performance by the 1<sup>st</sup> Defendant of its obligation under the agreement.

3.2 To the above end, the Plaintiff duly made payment of the sum of E500,000.00 (Five Hundred Thousand Emalangi) and presented such proof to defendants to enable delivery. To the same end, and on the 16<sup>th</sup> December, 2022 the Plaintiff further rendered the courier services referred to in paragraph 6 (a) (i) above thereby placing it (Plaintiff) in credit to the amount of E517,000.00 (Five Hundred and Seventeen Thousand Emalangi).

3.3 Notwithstanding the presentation of the said proofs of payment, the Defendants have to date failed to make delivery of the Merx. As a result of the same, the Plaintiff in December, 2021 gave notice of cancellation and demanded delivery. The Defendant(s) still failed to make delivery.

3.4 Owing to such non-performance by the Defendant(s), the Plaintiff and/or parties in January 2022 cancelled the agreement and the Defendants made undertaking to refund to the Plaintiff all amounts and in full by the 3<sup>rd</sup> February 2022.

3.5 The Defendants to date have only made part-payment to the Plaintiff in the amount of E170,000.00 (One Hundred and Seventy Thousand Emalangeni). This is notwithstanding the passage of a more than reasonable period for them to make payment of the entire amount as per undertaking.

3.6 To the above end, the Defendants remain indebted to the Plaintiff in the balance and/or sum of E344,000.00 (Three Hundred and Forty Four Thousand Emalangeni) and which amount is now due owing and payable but which sum, despite lawful and repeated demand, the Defendants refuse/neglect or fail to pay.

[4] By way of simple summons dated 20<sup>th</sup> April, 2022, the Plaintiff sued the Defendant for recovery of the amount of E344,000.00 (Three Hundred and Forty Four Thousand Emalangeni). A Declaration was filed on the 25<sup>th</sup> of May, 2022, which had been preceded by a Notice to Defend, filed by the Defendants' Attorneys on the 12<sup>th</sup> of May, 2022. The Notice to Defend prompted the Plaintiff to move the present application for summary Judgment. The Plaintiff, it seems apparent, has complied with the requirements of Rule 32. It now remains for the Court herein, to determine whether or not the contents of the affidavit resisting summary

Judgment which was filed by the Defendant, does disclose a *bona fide* defence, rendering the grant of summary Judgment to be improper in the circumstances.

- [5] Guidance on the principles that have been developed over the years is sought and obtained from legal authorities on the legal requirements and/or principles that guide Courts on how to deal with applications of this nature. The Learned Masuku J, in **Swaziland Development Financial Corporation v Vermaak Jacobus Stephanus High Court Case No. 4021/07**, gave a clear elucidation on the legal principles that guide Courts in this regard. To this end the Learned Judge herein referred to **Economy Investments v First National Bank of Botswana Ltd (1996) B.L.R 828 (C.A.) at 83 A** where the Learned Tebutt JA (as he then was) stated as follows:

*“It has been repeated over and over that summary Judgment is an extra-ordinary, stringent and drastic remedy in that it closes the door in final fashion to the defendant and permits a Judgment to be given without a trial.....It is for that reason that in a number of cases in South Africa, it was held that summary Judgment would only be granted to a plaintiff who has an*

*unanswerable case, in more recent cases that test has been expressed as going too far. In Du Setto's Case (supra), this Court came to a similar conclusion and I repeated that review in Fashion Enterprises (Pty) Ltd v Image Botswana (Pty) Ltd [1994] B.L.R. 288 C.A. As set out in De Setto's Case at 285 H, the purpose of summary Judgment is well known. It is aimed at a defendant who, although he has no bona fide defence to an action brought against him, nevertheless gives notice to defend solely in order to delay the grant of a Judgment in favour of the plaintiff. It therefore serves a socially and commercially useful purpose, frustrating an unscrupulous litigant seeking only to delay a just claim against him. However, even though the plaintiff need, not have an unanswerable case, it is clear that before a Court will close its doors finally to a defendant, it must take care to see to it that the plaintiff's claim is unimpeachable. Because of the drastic consequences of an order granting summary Judgment, the Courts must be astute to ensure that the procedure is not abused by a plaintiff who may either to secure, by the procedure, a Judgment against the defendant when he knows full well that he would ordinarily not to be able to obtain such a Judgment without trial or who may use the procedure as a means of embarking upon a fishing expedition to try to ascertain*

*prematurely what a defendant's defence is and to commit him to it by having him testify to it on oath*" (see paragraph 5 and 6 of the **Vermaak** case).

- [6] The Learned Masuku J, further in paragraph 7 proceeded to state that the legal duty of a defendant in a case where summary Judgment is sought can be gleaned from the case of **Busy Five Enterprises (Pty) Ltd v Marsh and Another [2005] 1 B.L.R. 51 (C.A.) at 56 G** where Korsha J.A. stated the following:

*"In resisting an application for summary Judgment the Defendant does not have to establish a cast iron defence. It is sufficient if what he alleges to be true may be capable of being proved at the trial and if so proved would constitute a defence to the Plaintiff's claim."*

- [7] At this juncture, and being emboldened by the guidance obtained from these authorities, it is an ideal opportunity to analyse the Defendant's case *in casu*, as presented in the Affidavit Resisting Summary Judgment filed herein. From the very onset the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their Affidavit

disclosed that they have raised triable and *bona fide* issues, which make it clear that summary Judgment may not be granted in the given circumstances. It was averred by the Deponent herein being the 2<sup>nd</sup> Respondent that first and foremost he (Mr. Lucky Ngubane and 2<sup>nd</sup> Respondent herein) had been wrongfully and/or irregularly joined in these proceedings as the 2<sup>nd</sup> Respondent since he was not a party to the agreement (be it in his personal capacity or as a surety in the alleged agreements between the Plaintiff and the 1<sup>st</sup> Defendant. It was the averment of the 2<sup>nd</sup> Defendant herein that the Plaintiff's claim is therefore defective, and deserving of being dismissed by the Court with costs for misjoinder of the 2<sup>nd</sup> Defendant.

[8] In relation to the merits of the matter, it is the assertion of the Deponent that the 1<sup>st</sup> Defendant does indeed have a bona fide defence to the Plaintiff's claim, on a proper evaluation of the contents of the Plaintiff Application for summary Judgment, together with the Plaintiff's Declaration. The Deponent herein further averred that the Notice of Intention to Defend was not filed solely for purposes of delaying the Plaintiff's claim. It was averred that the Plaintiff's claim is not capable of being resolved, or determined by this Court without the hearing of oral evidence.

[9] It was the submission of Counsel for the Defendants herein that summary Judgment proceedings deny a Defendant the opportunity to obtain evidence from its opponent through discovery, and/or to obtain evidence through the leading of oral testimony and most importantly, affording the Defendant the opportunity to cross-examine the Plaintiff, and its witnesses. The Counsel for Defendant submitted that the Plaintiff's claim herein is founded on a verbal agreement, and the terms of this agreement are vehemently denied by the Defendants, thus necessitating the leading of oral evidence, and cross-examination of those witnesses.

[10] After reading the Plaintiff's Declaration to Deponent in the Affidavit averred that the 1<sup>st</sup> Defendant has a right of set off, or a counter claim against the Plaintiff, which has good prospects of success. According to the Deponent in paragraph 6 of the Affidavit Resisting Summary Judgment, the 1<sup>st</sup> Defendant has a further right of set-off or a counter-claim against the Plaintiff which has a good chance of defeating the Plaintiff's alleged claim. According to the Deponent herein, the 1<sup>st</sup> Defendant's right of set-off is for an amount of E300,000.00 (Three Hundred Thousand Emalangeni), which is above the amount in principle,

which would have been due to the Plaintiff, being the amount of E130,000.00 (One Hundred and Thirty Thousand Emalangeni).

[11] The Defendant herein disputes that in or about the month of December, 2021, the Plaintiff and the 1<sup>st</sup> Defendant entered into one sale agreement of the truck described in the Declaration (being the Actros Truck Registered under number FM 695 B GP). In paragraph 8.1 of the Affidavit Resisting Summary Judgment, the 1<sup>st</sup> Defendant averred that in December, 2021, the Plaintiff and the 1<sup>st</sup> Defendant entered into two (2) separate sale agreements of two (2) different trucks, the details of which are as follows:

(i) On the 8<sup>th</sup> of December, 2021, a verbal agreement between the Plaintiff and the 1<sup>st</sup> Defendant, the latter being represented by me, in my capacity as its Director, was entered into for a sale of a Mercedes Benz Actros Truck, registration JN 14 Y M GP, MP2 3348), horse power, for the amount of E500,000.00 (Five Hundred Thousand Emalangeni). The Plaintiff paid a deposit of E200,000.00 (Two Hundred Thousand Emalangeni) on the 9<sup>th</sup> of December, 2021 (proof of such payments appearing in the Plaintiff's Declaration as E199,000.00 (One Hundred and Ninety

Nine Thousand Emalangi) and E1,000.00 (One Hundred Thousand Emalangi) on this date).

(ii) According to the Defendant herein this is a separate and distinct agreement that was concluded on or before the 8<sup>th</sup> of December, 2021. The terms of this agreement being:

- The deposit of E200,000.00 (Two Hundred Thousand Emalangi) was paid as stated herein above and a delivery of this truck was made to the Plaintiff on the 9<sup>th</sup> of December, 2021. In respect of this sale, the Plaintiff is indebted to the 1<sup>st</sup> Defendant in the balance of E300,000.00 (Three Hundred Thousand Emalangi).

[12] The 1<sup>st</sup> Defendant vehemently denied that there ever was at any point, a sale of a truck for the amount of E850, 000.00 (Eight Hundred and Fifty Thousand Emalangi) and further denied that there was ever a deposit of E500,000.00 (Five Hundred Thousand Emalangi) paid for the truck described by the Plaintiff in his Declaration (see paragraph 8.3)

[13] It was further denied in paragraph 8.4 by the 1<sup>st</sup> Defendant that there was a term in the verbal agreement relating to the payment of the balance to the Plaintiff in the form of providing courier services to the Plaintiff. The 1<sup>st</sup> Defendant denied the existence of such agreement relating to courier services. The Defendant averred that in fact, the claim that there was a term in the verbal agreement relating to the balance to be paid by the Defendant in the form of providing courier services is vague, confusing and vehemently denied. The Defendant stated that the allegation by Plaintiff that he rendered the alleged unknown courier services subsequent to the sale agreement but at the same time alleges that the delivery of the truck was never effected, yet this was allegedly the basis of the agreement. According to the Defendant, this contradiction in the Plaintiff's papers is self-defecting.

[14] It was also the case of the Defendant that the allegation by Plaintiff that the Plaintiff had actually used the truck, such, it was the case of the Defendant could only relate to the truck that was delivered to the Plaintiff on the 9<sup>th</sup> of December, which was used by then, and which Plaintiff did use for his own benefit from the 9<sup>th</sup> of December up until around, the 17<sup>th</sup> of December, 2021. It was the 1<sup>st</sup> Defendant's case that this vehicle (Mercedes Benz Actros) developed mechanical faults, whilst in the

possession of the Plaintiff, and the Plaintiff requested that the 1<sup>st</sup> Defendant's mechanics should attend to these problems, at the 1<sup>st</sup> Defendant's premises. According to the 1<sup>st</sup> Defendant this is a separate and distinct arrangement between the Plaintiff and the 1<sup>st</sup> Defendant's workshop mechanic. In paragraph 8.5, the 1<sup>st</sup> Defendant averred that he is advised and verily believes that this vehicle has since been appropriately fixed, and is ready for collection by the Plaintiff.

[15] In paragraph 8.6 of the 1<sup>st</sup> Defendant Affidavit, it was averred that on the 18<sup>th</sup> of December, 2021, a second separate and distinct contract was concluded for the purchase of another truck at the price of E700,000.00 (Seven Hundred Thousand Emalangeni). The terms of this contract were:

15.1 A deposit of E300,000.00 (Three Hundred Thousand Emalangeni) was to be paid by the Plaintiff towards this second truck, and then received delivery of same.

15.2 The Plaintiff did pay the E200,000.00 (Two Hundred Thousand Emalangeni) on the 20<sup>th</sup> of December, 2021, and made a further deposit of E100,000.00 (One Hundred Thousand Emalangeni) on

the 21<sup>st</sup> of December, 2021 (proof of payment being attached to the Declaration).

[16] In paragraphs 8.7 and 8.8 of the Affidavit Resisting Summary Judgment, the 1<sup>st</sup> Defendant conceded that it had failed to make delivery of this second truck, and a refund in the amount of E170,000.00 (One Hundred and Seventy Thousand Emalangeni) was paid by the 1<sup>st</sup> Defendant to the Plaintiff (annexed to the Affidavit “A” is a copy of such proof of payment). This refund was effected after the Plaintiff claimed a refund of the deposit of E300,000.00 (Three Hundred Thousand Emalangeni).

[17] The 1<sup>st</sup> Defendant in paragraph 8.8 denied that there had ever been a deposit of E500,000.00 (Five Hundred Thousand Emalangeni) paid in relation to the truck described in the Declaration made by the Plaintiff. The 1<sup>st</sup> Defendant conceded that it was liable only for a refund in the amount of E130,000.00 (One Hundred and Thirty Thousand Emalangeni), in respect of the second sale. It averred though in paragraph 8.10 of the Affidavit that it was entitled to a set-off of this amount as against the balance owed by the Plaintiff to the Defendant for the first sale. It was the averment of the 1<sup>st</sup> Defendant herein that the Plaintiff is liable to the 1<sup>st</sup> Defendant herein that the Plaintiff is liable to

the 1<sup>st</sup> Defendant in the sum of E170,000.00 (One Hundred and Seventy Thousand Emalangeni) in respect of the first sale, hence the 1<sup>st</sup> Defendant is not liable in any amount in view of the set-off for the amount of E344,000.00 (Three Hundred and Forty Four Thousand Emalangeni) as claimed. It was further averred that even if the Court held that the 1<sup>st</sup> Defendant is not entitled to the set-off of the “*refund*” against the balance outstanding, the 1<sup>st</sup> Defendant could only be liable for E130,000.00 (One Hundred and Thirty Thousand Emalangeni) and not E344,000.00 (Three Hundred and Forty Four Thousand Emalangeni). It was further averred that there was a cancellation of the agreement in respect of the first sale, hence the Plaintiff remains liable to the 1<sup>st</sup> Defendant for the first sale.

[18] According to the 1<sup>st</sup> Defendant, and in terms of paragraph 11 of the Affidavit, the basis upon which the Plaintiff applies for a Summary Judgment in a verbal agreement, the terms of which are all denied by the 1<sup>st</sup> Defendant, or at least it does not agree to the entirety of the said terms, which makes it impossible to determine without hearing of oral evidence. It is the 1<sup>st</sup> Defendant’s prayer that the matter ought to either be referred to trial, or the 1<sup>st</sup> Defendant ought to be granted leave to defend the Plaintiff’s claim.

[19] It was emphasized by the Defendant's Counsel in his arguments that all of the material facts alleged by the Plaintiff in his Declaration are disputed by the Defendant, and new facts relating to the Defendant's defence were alleged in the Affidavit Resisting Summary Judgment. It was submitted by Counsel that the Defendants had raised triable and *bona fide* issues, deposed to on oath, and therefore Summary Judgment ought not to be granted herein. Counsel herein cited Rule 32 (5) and maintained that Courts in general are reluctant to deprive a Defendant of his usual right to defend a matter, except where there is a clear case. He pointed out that the same cannot be said *in casu*. Citing the case of **Maharaj v Barclays National Bank 1976 (1) SA 418 (A) at 426**, which was cited with approval in the local cases of **Nedbank (Swaziland) Limited v Doctor Lukhele and two Others Civil Case No. 2008/2/09**. He maintained that *in casu*, the Defendants have successfully alleged in the Affidavit Resisting Summary Judgment, and some of these facts alleged to the Defendant's defence were confirmed or admitted by the Plaintiff in the Replying Affidavit. It was contended by Counsel herein that in terms of the above-stated authorities, the Court before granting Summary Judgment must enquire into the following:

- (i) Whether the Defendant has “*fully*” disclosed, the nature and grounds of defence and the material facts upon which it is founded.
- (ii) Whether on the facts so disclosed, the Defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law.

[20] It was the argument of Counsel for the Defendants that the Court ought to refuse Summary Judgment *in casu* because the requirements as stated by the authorities have been successfully established by the Defendant in making out a case for its defence, which defence is good in law, *and bona fide*. It was asserted by Counsel for Defendants that in terms of the law a defendant may rely on an unliquidated counter-claim to avoid Summary Judgment, and there is no requirement that the counter-claim ought to stem from the same set of facts that form the basis of the Plaintiff’s claim (See: **Alfor Peter John De Sousa v Petros Dlamini, Civil Case No. 3053/07**. Defendant’s Counsel stated that the cited case is authority that a *bona fide* defence to the application for Summary Judgment proceedings has been made out by the Defendants *in casu*, such that the Defendants have clearly pleaded the basis of its counter-claim in Respondent of the first sale, in terms of which the Plaintiff owes the 1<sup>st</sup> Defendant a balance of E300,000.00 (Three Hundred Thousand Emalangeneni).

[21] In response to the Affidavit Resisting Summary Judgment, it was the submission of Counsel for the Plaintiff that there has been compliance with the requirements as set out in Rule 32. Counsel herein also submitted that the key issue to be determined was whether or not the contents of the affidavit Resisting Summary Judgment, filed by the Defendants does disclose a *bona fide* defence. Counsel submitted that in order to answer this question, guidance on the principles of law must be sought from legal authorities. To this end, Counsel in his submissions relied on the case of **Swaziland Development and Financial Corporation v Vermaak Stephanus High Court Case No. 402/07**, as well as **Gilinsky and Anor v Superb Landers Dry Cleaners**.

[22] The Plaintiff's Attorney submitted herein that it is incumbent upon the court to consider the affidavit of the Defendant resisting Summary Judgment in order to establish if it discloses a *bona fide* defence as well as triable issues as envisaged in Rule 32 (4) before granting the relief of summary Judgment (per the **Swaziland Development and Financial Corporation Case** (*supra*)). Counsel herein further submitted that the Case of **Gilinsky** (*supra*) held that the Defendant must establish to the Court's satisfaction that he has a defence which, if proved would

constitute an answer to the claim, and that he indeed is advancing it honestly. The Court in this case even set out guidelines, according to Counsel, on what the affidavit must contain, in order to meet the standards as set out by the afore-stated Rule, these being:

(a) The nature;

(b) The grounds of the defence; and

(c) The material facts relied upon to establish such a defence and these requirements must be stated fully.

[23] It was further contended by Counsel herein that the said case of **Gilinsky** (*supra*) further held that if the allegations as set out in the Defendant's affidavit are equivocal, or incomplete or open to conjecture, the requirements of the Rule in question have not been thereby complied with. It was submitted by Counsel that the material facts of the defence must be stated by the Defendant with sufficient particularity and clarity so as to enable the Court to determine whether the affidavit does indeed disclose a *bona fide* defence.

[24] In relation to the matter at hand, the Plaintiff's Counsel contended that on the merits, the defence as preferred by the Defendant is found wanting for two reasons:

(a) It was not being raised in good faith.

(b) It is speculative, leaving much to conjecture and/or surmise.

[25] It was argued by Counsel for the Plaintiff that in terms of the legal position stated in **Lady Anne Tennant v Associated Newspaper Group 1979 FSR 298**:

*“A desire to investigate alleged obscurities and hope that something will turn up in the investigation cannot separately or together amount to sufficient reasons refusing to enter Judgment for the Plaintiff. You do not get leave to defend by putting forward a case that is all surmise and macaw-berism”.*

[26] Plaintiff's Counsel argued that the Defendant's affidavit was speculative and failed to specifically impugne the particulars of the Plaintiff's claim.

It was also the contention of Counsel herein that in relation to the actual defence that the Defendant seeks to rely on, it was contended by Counsel herein that this party had failed to set out, with sufficient particularity what their defence is. It was argued by Counsel that in the absence of such particularity, this Court cannot hold that a triable issue has been raised by the Plaintiffs because they have not set out the particulars of the defence that they would have at trial.

[27] The Plaintiff's Counsel opined that the Defendant herein has no *bona fide* defence and that the notice of intention to defend, and the affidavit Resisting Summary Judgment has been filed simply as a dilatory tactic. The Counsel herein listed the following as reasons for his submissions:

(a) The allegations made and advanced relating to an alleged "*set-off*" dismally fell short of meeting the legal requirements that would sustain this kind of defence, particularly at summary Judgment level.

(b) The Defendant does not deny receipt of any of the amounts paid by Plaintiff to him. The Defendant further acknowledges that none of the *merces* he refers to are in the Plaintiff's possession. Defendant further acknowledges that it has only made refund of an amount of

E170,000.00 (One Hundred and Seventy Thousand Emalangeneni). By means of basic arithmetic this leaves a balance of E344,000.00 (Three Hundred and Forty Four Thousand Emalangeneni).

(c) The Defendant, according to Counsel for the Plaintiff, is seeking to polarise issues unnecessarily. Counsel herein stated that the Defendant is fully aware that the “*initial sale*” is not the subject of the dispute herein. According to Counsel, the Defendant is very much aware that the “*initial sale*” was mutually cancelled as a result of him having sold to Plaintiff a defective and dysfunctional merx. Only in the Affidavit Resisting Summary Judgment does the Defendant, for the first time, disclose that the dysfunctional truck was later repaired. This is done without stating that he has communicated this to anyone, and what such communication might have achieved. This according to Counsel is left to speculation and surmise.

(d) The Defendant is aware that the parties agreed that all payments that had already been advanced in respect of the defective merx would serve as a deposit towards this new sale agreement which grounds the cause of action *in casu*.

(e) The defendant's allegations in this regard clearly show a lack of honesty and *bona fides* in his papers because of the following:

(i) The initial cancelled sale has nothing to do with the present proceedings.

(ii) The Plaintiff made use of an entirely different mode of transport to meet his obligations. He used another truck that he had at his disposal at the given time, and not the "*courier services*" that were allegedly being provided by the Defendant.

(f) The Defendant's papers are without a *bona fide* defence under the circumstances. Defendant does admit in his papers that the Plaintiff has made payments to it of quite a substantial extend, and that it has neither delivered the truck, nor made a full refund to the Defendant.

## **ANALYSIS OF SUBMISSION AND LEGAL FINDINGS MISJOINDER**

### **[28] POINT OF LAW –MISJOINDER**

Regarding this point, the Defendant's Counsel contended that there has been misjoinder of the 2<sup>nd</sup> Defendant in these proceedings, therefore these proceedings ought to be dismissed because the Plaintiff's claim is

defective, this point of law must of necessity be interrogated first prior to the Court being able to deal with its merits. The Defendant's Attorney argued herein that the 2<sup>nd</sup> Defendant had been joined herein in a manner that is irregular since he was not a party to the alleged oral agreement, and he did not bind himself either as a surety herein, nor in his personal aspects. On the other hand, the Plaintiff herein, in the Declaration filed alleged that not only was the Defendant instrumental to the conclusion of the oral contract because he represented the 1<sup>st</sup> Defendant in the negotiation of same, but he also bound himself as surety and/or co. and principal director for the due performance by the 1<sup>st</sup> Defendant in the obligations of the 1<sup>st</sup> Defendant under said contract.

[29] According to **Herbstein and Van Winsen, "The Civil Practice of the High Court of South Africa, 5<sup>th</sup> ed, page 240**, Courts are to be guided by a particular test in order to determine whether, a party has been joined as a necessary party when in actual fact, he is not a necessary party. The Learned authors state as follows:

***"The test to determine whether there is a misjoinder is whether or not the party has a direct and substantial interest in the subject matter of the action, i.e. a legal interest in the subject matter of***

*the litigation which might be affected prejudicially by the Judgment of the Court.”*

[30] The Court herein, in view of the direction provided by the authority cited herein above, holds that there has been no misjoinder *in casu*. The Plaintiff herein alleged that the 2<sup>nd</sup> Defendant actually bound himself as a surety and/or in co. and principal debtor for the due performance of the oral contract (if there is indeed one).

[31] The issue of whether or not the Plaintiff herein is entitled to summary Judgment is one also that is best determined with reference to legal authority. In the case of **Kukhanya (Pty) Ltd/Gabriel Couto J.V. & 2 Others v Kukhanya Construction (Pty) Ltd**, the Court held as follows:

*“ [34] The real question is whether or not summary Judgment is in law warranted from the facts of the matter. The position is long settled that such a remedy avails a Plaintiff who has among other things a liquid claim against the defendant. Put differently it will not be granted where the defendant can show according to Rule 32 (4) (c) that there is an issue*

*or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part thereof. This requirement of the rules, it was observed Sinkhwa SemaSwati t/a Mister Bread Bakery and Confectionery v PSB Enterprises (Pty) Ltd, High Court Civil Case No. 3830/2019, required the Defendant to show that there is a triable issue or question or that for some other reason there ought to be a trial. It was observed that this requirement of the current rule spelt a move from the previous one (that is the one before the 1990 Amendment of the Rules per legal Notice No. 38 of that year) which required that Defendant to “disclose fully the nature and grounds of the defence and the material facts relied upon thereof.”*

[32] The Learned Fakudze J in the case of Farm Chemicals Limited v Sokhulu Partners Investments (Pty) Ltd & 2 Others (1314/16) [2018] SZSC 42 (21 March, 2018), further referred to the case of Sinkhwa SemaSwati (*supra*) in the following manner:

*“[16] The Learned Judge further observed that:*

*“The remedy provided by the rule is extra ordinary and a very stringent one in that it permits a Judgment to be given without trial. It closes the door of the Court to the defendant. Consequently, it should be resorted to and accorded only where the Plaintiff can establish his claim clearly and the defendant fails to set up a bona fide defence. While on the one hand the Court wishes to assist a plaintiff whose right to relief is being balked by the delaying tactics of a defendant who has no bona fide defence, on the other hand it is reluctant to deprive the defendant of his normal right to defend except in a clear case.”*

[33] The Supreme Court case of Musa Sifundza v Swaziland Development and Savings Bank, Civil Case No. 67/12 at paragraph [8] made the following holding:

*“[8] It is well recognised that summary Judgment is an extraordinary remedy, it is a very stringent one for that matter.*

*This is because it closes the door to the defendant without trial. It has the potential to become a weapon of injustice unless properly handled. It is for these reasons that the Courts have over the years stressed that the remedy must be confined to the clearest cases where the defendant has no bona fide defence and where the appearance to defend has been made solely for the purpose of delay.”*

[34] The legal authorities surveyed herein above, detail that, it can be summarised that a Plaintiff who utilises the Rule 32 mechanism of summary Judgment must on the pleadings, establish a clear and unanswerable case in order that Judgment may be granted, without need of going to trial. For this to happen, the defence raised by the Defendant must be found to be wanting and/or unsatisfactory. The fact of weighing the evidence of the parties on the pleadings, must of necessity be done with much care, particularity, and attention to detail so as to avoid causing an injustice to the parties. It can safely be said that when the facts and evidence are found to be evenly balanced, or indeed in doubt, a trial must be ordered by the Court in order to avoid such injustice.

[35] *In casu*, the Plaintiff is suing on the basis of a breach of an oral agreement allegedly concluded with the 1<sup>st</sup> Defendant (the 2<sup>nd</sup> Defendant having represented the 1<sup>st</sup> Defendant during the negotiations). The 1<sup>st</sup> Defendant in the Affidavit Resisting Summary Judgment effectively disputed most if not all the terms of the said verbal contract. The Defendants alleged new facts relating to the Defendant's defence and/or a counter claim which does not necessarily stem from the same set of facts. The fact that a counter claim (or indeed a set-off) was alleged by the Defendant amounts to a triable issue. Indeed, the Defendant alleges that there were two separate oral agreements concluded by the parties herein, which agreements relate to the sale of two distinct trucks, these being:

**(a) Actros Truck registered under F.M. 965 B GP**

**(b) Mercedes Benz Actros Truck registered under NJ 14 YM GP,  
MP2, 3348.**

[36] Even the purchase prices for said vehicles, are according to the Affidavit resisting summary Judgment different. The Defendant further denied the existence of another term which was asserted by the Plaintiff, that is that the balance of the purchase price being payable in the form of the provision of courier services by the Plaintiff to the Defendant. The

Defendant vehemently denied that this arrangement was ever made as between the parties. The Defendant also vehemently contended that contrary to the assertions of the Plaintiff delivery of the truck was never made, and yet is claiming that the said courier services which are denied were going to be provided using the same vehicle. This was according to the Plaintiff not the case because the Plaintiff was going to use a different vehicle to provide said services. Again, it boggles the mind why the Plaintiff bothered to perform the alleged settlement of the balance of the purchase price of the truck by means of performing the courier services, if indeed the Defendant failed to deliver the truck in the first place.

[37] It was also asserted by Defendant that on the 17<sup>th</sup> December, 2021 whilst the Mercedes Benz Actros truck was being used by the Plaintiff it developed mechanical problems, and was returned to the premises of the 1<sup>st</sup> Defendant so that its mechanics could attend to said problems. According to the Defendant this truck was fixed and is ready for collection, and yet it was contended by Plaintiff that delivery was never made. The Plaintiff in the other hand contends that the Defendant herein is seeking to polarise matters in an unnecessary fashion, and insisted on the non-existence of the set-off, as well as the two separate contracts. The Plaintiff also insisted that the parties had indeed agreed that the

Plaintiff would provide courier services to pay off the balance due in the trucks.

[38] The Court, in view of all the submissions made herein, the Court finds that the Plaintiff's claim is not competent for the grant of summary Judgment. The Defendant herein disputes almost the entirety of the alleged terms of the oral agreement as asserted by the Plaintiff. The issues of the precise number of contracts between the parties, and whether or not indeed the 2<sup>nd</sup> Defendant did indeed agree to stand and be bound as surety for the contract between Plaintiff and 1<sup>st</sup> Defendant cannot be determined through summary Judgment. This claim, in the Court's view, can only be determined by way of oral evidence. The Court in the **Farm Chemicals matter** (*supra*) further stated the following:

***“[17] In C.S. Group of Companies v Constructions Associates (Pty) Ltd Civil Case No. 41/2008, the Learned Chief Justice Banda as the then was, equally observe d at page 14 that:***

***“It has also been held that Courts should be slow to close the door to the defendant if a reasonable possibility of a defence exists to avoid an injustice.”***

[39] In the premises the Court orders as follows:

(a) Summary Judgment herein is denied.

(b) The claim of the Plaintiff herein is referred to trial.

(c) Costs are to be costs in the main cause.

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**K. MANZINI**  
**JUDGE OF THE HIGH COURT OF ESWATINI**

**For Plaintiff:** MR. T. NDLOVU (MTM NDLOVU ATTORNEYS)

**For the Respondents:** MR. K. SIMELANE (KN SIMELANE ATTORNEYS IN  
ASSOCIATION WITH HENWOOD AND COMPANY).